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ABSTRACT

The Bill of Rights to the United States Constitution marks its Bicentennial in 1991. These documents are designed to educate secondary students about various aspects of the Bill of Rights and its history. Topics covered in the five issues are: a Bill of Rights for the American people; the Bill of Rights and the Supreme Court; the fourth amendment and the right to privacy; due process of law and the fifth amendment; judicial equity and the sixth amendment; the seventh amendment and federal jury trial rights; and the eighth amendment and capital punishment. Each issue contains exercises for students. (DB)

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Gazette

The American Constitutional Bicentennial

Issues 26-30

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The American Constitutional Bicentennial

Gazette

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"I...affirm that bills of rights...are unnecessary in the proposed Constitution...For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained when no power is given by which restrictions may be imposed?"

(Alexander Hamilton, Federalist 84).

A BILL OF RIGHTS FOR THE AMERICAN PEOPLE

December 15, 1991 marks the bicentennial of the Bill of Rights to the Constitution. Introduced by federalist James Madison of Virginia on June 8, 1789 as ten amendments (Article V) to the Constitution, the Bill of Rights was intended to be a formal guarantee to selected citizens of basic liberties. Two centuries of American culture have altered both the scope and application of these rights to the benefit of more groups and classes of our citizens.

The American Bill of Rights, ratified by the Virginia vote on December 15, 1791, became both an affirmation of human liberty and a catalyst to revolutionary sentiment in Europe. By 1790 European monarchical government was witness to the ascendency of natural rights empiricism and representative government methods and practices on an unprecedented scale.

Enlightenment skepticism coupled with political action and conflict in the colonies contributed significantly to the American experiment in democracy. A metamorphosis of sorts---from the War of Independence, to a temporary Confederation plan for the new states, to a written federal Constitution, and finally, to a citizen Bill of Rights---was accomplished in a single human generation.

Revolutionary patriot and ardent anti-federalist Thomas Paine expressed the 18th century need for American liberation clearly:

"We fight not to enslave, but to set a country free, and to make room upon the earth for honest men to live in." (The American Crisis, December 23, 1776).

Below are nine key date in the American Constitution and Bill of Rights period:

1. September 28, 1787---
   Congress votes to send the text of the Constitution to the 13 state legislatures for a vote.

2. December 7, 1787---
   Delaware becomes the first state to ratify the Constitution by a unanimous vote of 30-0.

3. June 21, 1788---
   New Hampshire becomes the ninth state to ratify the Constitution 57-47. This satisfies the legal 75% requirement of Article V.

4. April 1, 1789---
   The House of Representatives meets for the first time. 30 of 59 members attend. The Senate meets first five days later.

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BILL OF RIGHTS TRIVIA

A1: Which delegates to the Constitutional Convention of 1787 also co-authored the Virginia Declaration of Rights in 1776, a blueprint for the Constitution?

A2: As stated in Article V, what percentage of the states is needed to ratify a proposed Constitutional amendment?

(answers below)

5. April 30, 1789---
George Washington is sworn in at the New York state house as America's first president.

6. June 8, 1789---
James Madison, Representative from Virginia, introduces the Bill of Rights to the Constitution as amendments 1-10.

7. September 25, 1789---
The House and Senate approve the Bill of Rights and send the text on to the states for ratification.

8. May 29, 1790---
Rhode Island is the thirteenth state to ratify the Constitution thirty-two months after adjournment of the Convention by a vote of 34-32.

9. December 15, 1791---
Virginia becomes the tenth state to ratify the ten amendments, thus formalizing the Bill of Rights.

EXERCISES FOR STUDENTS

Students of American History and Government should memorize each of the amendments in the Bill of Rights, and give one example orally or in writing of the relevance of each in contemporary life. Then, students should research one court case involving a right of expression and write an opinion on the court decision.

AMERICA IN 1790

The first census recorded a U.S. population of 4,000,000, 90% were farmers, 5% lived west of the Appalachian Mountains.

The average age of House and Senate members (both all male bodies) was 46.

The Presidential Cabinet consisted of four advisors: State, Treasury, War, and the Attorney General.

2,605,699 Americans (66.3%) by family name were of English or Welsh heritage; blacks numbered 757,181 (19.3%).

The average family size was 8.

The Northwest Ordinance of 1787 was applied in law by Congress in 1790 and provided 265,000 square miles of territory north and west of the Ohio River for statehood. No fewer than three and no more than fivestates were created: Ohio (1803), Indiana (1816), Illinois (1818), Michigan (1837), and Wisconsin (1848).

TRIVIA ANSWERS

A1: George Mason, Edmund Pendleton, and James Madison

A2: 3/4ths or 38 states in 1990.

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"Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. Individuals must not be left impoverished in their constitutional rights on a plea of military necessity that has neither substance nor support."

(Justice Murphy, Dissenting Opinion, Korematsu v. U.S., 1941).

THE BILL OF RIGHTS AND THE SUPREME COURT

Passage and ratification of a Bill of Rights for the American people represented a compromise between federalists who favored a strong national government, and anti-federalists who feared the loss of state sovereignty and individual liberties with ratification of a Constitution. Anti-federalists, loyal to Thomas Jefferson, pointed to Article I, Section 8, paragraphs 1-18, and particularly to the "necessary and proper" clause as a threat to states rights. Of course, the 10th Amendment "reserves" certain governmental powers to the states and to the people, that is, powers not delegates to the national government.

In the 20th century legal challenges to the Bill of Rights demonstrate that James Madison's majority "factions" can, indeed, be limited and minority rights safeguarded by federal courts.

In post World War II America the protection of minority rights has been demonstrated by Supreme Court application of the 14th Amendment "due process" and "equal protection" provisions to basic freedoms of expression in the Bill of Rights.

Examples of these safeguards in civil rights cases are Brown v. Bd. of Education (1954), Engle v. Vitale (1962), and enforcement of the Civil Rights Acts of 1964, 65, and 1968.

Civil rights of those accused of criminal acts have been defined procedurally (but not without controversy) by the Court in Gideon v. Wainwright (1963), Escobedo v. Illinois (1964), and Miranda v. Arizona (1966).

THE FREEDOM OF EXPRESSION

What is freedom of expression? Are there limits to personal liberties? Can government curtail or even suspend civil rights in times of national crises?

While Madison, Jefferson and other intellectuals of the period believed First Amendment rights were primary, they rejected the notion that all rights were absolutes. That is, excesses of expression which resulted in personal injury or social harm could be checked by state laws. The distinction was that civil rights were granted to all citizens by birth (unalienable), and political rights were those for which citizens qualified, and could be denied by state or federal governments. Thus, when one's civil rights were violated by arbitrary action of citizens or governments, it was one's duty to seek a remedy in the judicial department. Since Marshall's Marbury v. Madison opinion in 1803, it has been the job of the Supreme Court to determine the Constitutionality of state and federal legislation.

BILL OF RIGHTS TRIVIA

A1: How many states, prior to ratification of the Constitution, called for a Bill of Rights as a condition for acceptance?

A2: Which of the thirteen original states was last to ratify the citizen Bill of Rights?

(answers below)

FREEDOM OF EXPRESSION
AMENDMENT I
Text

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Specific Rights

Permits expression of religious beliefs and practices;

Prohibits the establishment of a state church (church/state separation);

Permits freedom of speech and the press;

Permits freedom of peaceful assembly;

Permits citizen appeals by means of petition to state legislatures and to Congress.

THE RIGHT TO BEAR ARMS
AMENDMENT II
Text

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Specific Rights

Permits arming of a "well-regulated" state or national militia composed of citizens from the states. The state governors can regulate.

Prohibits the state and federal governments from confiscating arms from private citizens.

QUARTERING OF SOLDIERS
AMENDMENT III
Text

No soldier shall, in time of peace be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Specific Rights

Permits a citizen ownership of private property;

Prohibits non-consenting entry by militia into homes or property of private citizens;

Requires state legislature or the Congress to define any exclusions to property rights.

EXERCISES FOR STUDENTS

Read Taking Liberties by Alan M. Dershowitz (Chicago: Contemporary Books, 1988). Case study analysis of Bill of Rights issues in the 20th century.

TRIVIA ANSWERS

A1: Five States.

A2: Rhode Island, May 29, 1790 by a vote of 34-32.

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"It is emphatically the province and duty of the judicial department to say what the law is...If two laws conflict with each other, the courts must decide on the operation of each."

(Justice John Marshall, Marbury v. Madison, 1803).

THE FOURTH AMENDMENT
"Search and Seizure"

As British subjects until the formal signing of the Treaty of Paris in 1783, Americans of many persuasions and occupations mistrusted intrusions by government into private affairs, particularly the Crown's practice of confiscating property without a writ in the royal colonies.

The 4th Amendment to the Bill of Rights was written to protect the citizens of the states against unjustified searches or seizures of persons or personal property without both probable cause and appropriate judicial warrants. An independent judiciary composed of local, state and federal courts was responsible for preserving the right to own and will to heirs private property by means of Constitutional interpretation and precedential examples.

Few rights remain more precious to Americans than the right to privacy. Yet the 4th Amendment has been the focus of judicial intransigence and inconsistency in periods of conflict in America's past. For example, 4th Amendment rights were suspended in emergency executive orders by President Lincoln during the Civil War (1863-64), and by Franklin D. Roosevelt in 1942: both actions succeeded without challenge by seated Supreme Courts. Searches and seizures of Confederate troops, supply vehicles, and confiscation of privateering vessels, and later, the internment of 110,000 Japanese Americans in western state "relocation" centers under Order 9066 were implemented virtually without cause or warrant.

THE RIGHT TO PRIVACY
Amendment IV
Text

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Specific Rights

Prohibits government searches or seizures of personal property without a signed warrant;

Requires probable cause and sufficient evidence to produce a warrant of arrest;

Protects citizens against loss of property not specified in a warrant;

Implies that the Supreme Court can specify the procedural basis for searches under the phrase "probable cause"; and

Recognizes property ownership as a civil right.

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BILL OF RIGHTS TRIVIA

A1: Which amendment in the Bill of Rights guarantees "due process of law"?

A2: Which amendment has often been cited as a defense of the right to privacy?

A3: Which amendment prohibits "excessive fines and bail" and "cruel and unusual punishment"?

(answers below)

EXERCISES FOR STUDENTS

To reinforce student understanding of search and seizure provisions of the 4th Amendment, students should read the texts of Court opinions in three of the 20th century cases listed below. They will then write a summary of 500-600 words that answers these questions:

1. What was the issue in the case?
2. How was the case argued by the plaintiffs? By government?
3. Do you agree with the outcome of the Court in each case? Why? Why not?

Case 1: Korematsu v. U.S., 1943.

Case 2: Hirabayashi v. U.S., 1943.

Case 3: Rochin v. California, 1952.

Case 4: Mapp v. Ohio, 1957.

Case 5: Katz v. U.S., 1967.

Case 6: New York Times v. U.S. (Ellsburg case), 1971.

Student summaries will be shared in class when selected students read essay responses to classmates. A class poll should be taken for each case to measure student concurrence against real Court opinions. Tie votes produce no decision.

This class activity should be used for the 5th and 6th Amendments to follow.

PRIVACY AND ROE v. WADE

1973 was a landmark year for a test of the 4th Amendment right to privacy. At issue was the right of a woman to receive a theraputic or saline abortion upon demand in the first two trimesters of pregnancy at public expense.

A 7-2 decision of the Berger Court affirmed a woman's "fundamental" abortion right ruling that state laws forbidding abortion were henceforth unconstitutional. A 1989 Rehnquist Court decision removes the abortion controversy from the high court and returns the privacy right to a vote of state legislatures. Pro-choice advocates fear this decision will politicize a guaranteed civil right, while Pro-Life advocates applaude the decision as a step toward removing legislative power from the Court.

TRIVIA ANSWERS

A1: The 5th Amendment.

A2: The 4th Amendment, case of Roe v. Wade, 1973.

A3: The 8th Amendment.

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"Like the course of the heavenly bodies, harmony in national life is a resultant of the struggle between contending forces. In frank expression of conflicting opinion lies the greatest promise of wisdom in governmental action; and in suppression lies the greatest evil."

(Justice Louis Brandeis, Gilbert v. Minnesota, 1920)

DUE PROCESS OF LAW AND THE FIFTH AMENDMENT

Students of government can identify six essential characteristics of a modern nation-state: a permanent population, territorial boundaries, a common language, patterned production and allocation of resources and consumer goods, a common (written) law, and a system of law enforcement by government.

Government in a political system which is based on popular consent invariably is witness to conflicts among its citizens over basic rights. Civil rights in a democracy cannot be compromised by mere whim of the legislature, or by arbitrary executive order. Resolution of conflicts is the province of the courts; both accuser and accused must abide by the judgment of magistrate or jury. Our framers were sensitive to abuses of the Crown and institutionalized the concept that one is "innocent until proved guilty" in judicial proceedings. The 5th Amendment to the Bill of Rights was an attempt to guarantee to individual citizens equal treatment of the laws when accused of criminal acts. We call this safeguard due process of law. Few rights in our nation-state are more important to citizens than due process of law. The Constitution requires that both the substance and the procedure of enforcement of a law be predicated on the principle of judicial equity.

AMENDMENT FIVE
Text

"No person shall be held to answer for a capital crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Specific Rights

Requires a formal indictment or a listing of charges (information) against an accused person before any prosecution;

Protects an accused person from facing multiple convictions for a single crime;

Permits an accused person to remain silent to avoid self-incrimination in cross-examination;

Requires state and federal courts to provide a proper procedure for arrest, hearing, trial, and case resolution; and,

Sets forth conditional compensation for imminent domain over private property by states and the federal government.

BILL OF RIGHTS TRIVIA

A1: Can you name the only Constitutional amendment to be repealed, fourteen years after its ratification?

A2: Which amendment in the Bill of Rights reserves certain powers to the states and to the people?

A3: When did the states finally complete majority ratification of the Bill of Rights?

(answers below)

JUDICIAL EQUITY AND THE SIXTH AMENDMENT

AMENDMENT SIX
Text

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witneses in his favor, and to have the assistance of counsel for his defense."

Specific Rights

Provides the accused person a speedy and public trial;

Permits an accused person the right to confront accusers and produce friendly witnesses in his/her defense;

Affords an accused person the right to seek legal advice and be represented by an attorney in court; and

Requires that an accused person be prosecuted by an impartial jury of peers in his/her resident venue.

Clearly, the framers sought to expand and specify 5th Amendment principles in the 6th Amendment.

EXERCISES FOR STUDENTS

A.P. classes will read the majority and dissenting opinions in these 5th and 6th Amendment challenge cases: Gideon v. Wainright (1963); Heart of Atlanta Motel v. U.S. (1964); and Miranda v. Arizona (1966).

Then, students will divide into 6 panels (two for each case) and prepare notes for a debate on the issue below.

Affirmative: The Warren Court usurped its interpretation role in case _____ because it legislated rights that did not exist in the 5th or 6th Amendment language. All decisions are invalid.

Negative: These case opinions should not be overturned because the Court cannot ignore social and political changes over time. Interpretation of the high Court often involves the task of directing and legislating.

TRIVIA ANSWERS

A1: The 18th Amendment.

A2: The 10th Amendment.

A3: December 15th, 1791 by the Virginia vote.

The American flag has 13 red and white stripes (7-6) to symbolize the original 13 states.

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"A long habit of not thinking a thing wrong, gives it a superficial appearance of being right, and raises at first a formidable outcry in defense of custom."

(Thomas Paine, Common Sense, 1776).

THE SEVENTH AMENDMENT AND FEDERAL JURY TRIAL RIGHTS

Prior to ratification of the U.S. Constitution and Bill of Rights by the states, two fundamental concepts were firmly rooted in the legal concerns of colonists and citizens. Students of American government recognize them as Common law and Statute law. American common law represents the accumulation of custom and social tradition in a civil culture. Customs are legitimated by Court action. English customs applied to the American colonies and states constitute our common law. Common law issues and problems predated Parliamentary or Congressional statutes, and hence, became more essential to the social and economic fabric of American life. Examples of common law abound in modern life:

--Law is derived from consent of the governed;
--Courts settle civil disputes;
--Marriages and families are the basic legal units of society; and
--Individuals may be punished for wrongful acts.

Statutory law represents the accumulation of legislative acts by majority decree in matters of human discourse. Statutes set conditions, rights, and punishments in specific language by a majority legislative action. Examples include:

--Political rights;
--Administrative rules/regulations
--Constitutional rights (specified in both federal and state documents);
--And punishments for crimes.

SEVENTH AMENDMENT
Text

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Specific Rights

Provides a right to a federal jury trial for common law matters;

Excludes federal statutory requirement of jury trial;

Establishes a minimum dollar amount upon which a law suit for damages can be litigated; and

Excludes any requirement that states provide jury trials in civil (small claims) matters.

States can, therefore, establish non-jury trials for civil claims and set minimum/maximum dollar parameters for claims.

DID YOU KNOW?

That, as of January 1, 1990, the maximum dollar claim for small claims awards in California became $2,500.
A judge's decision is final in all small claims cases.

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BILL OF RIGHTS TRIVIA

A1: Which amendment guarantees an accused person a speedy jury trial, the right to confront accusers, and the right to remain silent in a court of law?

A2: Which amendment prohibits the states from violating a citizen's rights to "due process of law"?

A3: In 1791, who was qualified to vote in national elections?

(answers below)

THE EIGHTH AMENDMENT AND CAPITAL PUNISHMENT

While Amendments five and six focus on equity and procedural fairness for the accused in criminal trials, the eighth Amendment clearly addresses the punishment power of the federal courts. In theory, judicial fairness is followed by compassion and restraint.

On June 29, 1972 the Supreme Court (in Furman v. Georgia) "ruled that the death penalty was unconstitutional in all cases in which it had been unfairly applied to defendants who were poor or members of minority groups and was not used in cases where white or affluent defendants had been convicted of the same crimes." Angela Holder, The Meaning of the Constitution, p. 75.

The Supreme Court decision left open the question as to whether capital punishment would be permitted in cases wherein the convicted person were punished in statute only by the death penalty.

The "cruel and unusual punishment" clause has been used by the Court to review both substantive and procedural issues in criminal proceedings appealed from the states. Today, state courts and legislatures can impose the death sentence for capital crimes. In California the governor can commute the penalty of death in the gas chamber. California's last execution occurred in 1967. Methods of execution in the 50 states are: hanging, firing squad, lethal injection, electrocution, and gas chamber.

AMENDMENT EIGHT
Text

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Specific Rights

Provides bail to arrestees prior to trial date (set by judge);

Prohibits bail or fines to exceed statute limits for crimes listed in the information or indictment;

Prohibits the state from using method of torture (common to medieval England) on accused and convicted persons;

Permits a judge, under application of the 14th Amendment, to imprison one who refuses to pay a fine imposed by a Court;

Sustains a prisoner's rights to food, shelter, and adequate medical care while detained or imprisoned;

Suspends political rights (travel, association, voting) but retains some civil rights of a prisoner.

TRIVIA ANSWERS

A1: The 6th Amendment.

A2: The 14th Amendment, Section 1.

A3: Free white males of majority age (21) who owned property.